(29)

received
8-26-97

August 22, 1997

Department of the Interior
Minerals Management Service
Mail Stop 4700
381 Elden Street
Herndon, Virginia 20170-4817

Subject: Oil Spill Financial Responsibility for Offshore Facilities (62 FR 14052)

Dear Sir:

The Interstate Natural Gas Association of America (INGAA) is a non-profit trade association representing virtually all interstate natural gas transmission pipeline companies operating in the United States and interprovincial pipelines operating in Canada, as well as natural gas companies in Mexico and Europe. INGAA's U.S. members operate over 200,000 miles of pipeline and related facilities and account for over 90 percent of all natural gas transported and sold in interstate commerce. INGAA appreciates the opportunity to participate in this rulemaking process and offer the following comments for consideration.

General Comments

Today's comments are intended to support those previously submitted by INGAA in response to EPA's Advanced Notice of Proposed Rulemaking (ANPRM) for this rule which was published in the *Federal Register* on August 25, 1993 (58 FR 44797). Many of the issues raised in the proposed rule (62 FR 14052) were addressed by INGAA in our comments to the ANPRM. As such, we are resubmitting those comments without changes for inclusion in this docket.

Of particular concern to the natural gas pipeline industry is how natural gas condensates are defined under the Oil Pollution Act of 1990. As such, we are taking this opportunity to further discuss our position.

DEFINITION OF OIL

Four major oil spills, including the *Exxon Valdez*, took place in U.S. waters in 1989. Congress soon determined that legislation was needed to "internalize" the costs of oil spills "within the oil industry and its transportation sector." The following year, Congress passed OPA 90.

Among other things, OPA 90 establishes financial responsibility requirements for: (1) vessels that carry oil as a cargo or fuel; (2) deepwater ports beyond the territorial sea that are licensed for the transportation of oil; and (3) other offshore facilities used in oil exploration, storage, handling, transportation, and similar activities. In all these cases, it is the "responsible party" who must demonstrate financial responsibility.

For vessels, the responsible party's maximum liability is set on a sliding scale depending on the amount of oil that can be transported, and the financial responsibility requirements are set according to that sliding scale. The responsible party for a deepwater port is potentially liable for $350 million in oil spill damages, and must also demonstrate $350 million in financial responsibility. Accordingly, the amount of required financial responsibility for vessels and deepwater ports is commensurate with the responsible party's maximum liability under OPA 90. In contrast, the financial responsibility level for each offshore facility is $150 million, regardless of the statutory maximum liability, and regardless of the facility's operational or environmental risk.

MMS has taken the position that, if natural gas pipelines are "offshore facilities" within the meaning of OPA 90, they are subject to this $150 million requirement unless they "handle or produce only dry natural gas." Although MMS does not explain its rationale in detail, apparently MMS is arguing that natural gas liquids (i.e., "highly volatile, light end petroleum fractions), normally referred to as natural gas condensate, fall within the Act's definition of "oil."

INGAA believes that MMS has exceeded its statutory authority by including natural gas condensate under the definition of oil. In OPA 90, "oil" is defined as:

> "Oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction

> thereof, which is specifically listed or designated as a hazardous substance under...the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act. "

Natural gas condensate does not fit this definition. Condensate is a light hydrocarbon liquid obtained by condensation of hydrocarbon vapors. It consists of varying proportions of butane, propane, pentane and heavier fractions, with little or no ethane or methane. Condensate is found in the gaseous phase in the subsurface reservoir but will separate out in liquid form at the pressures and temperatures at which production separators normally operate. As a practical matter, natural gas pipelines do not carry a great deal of condensate, for to do so would inhibit their ability to carry natural gas. Compressor stations typically have slug catchers or scrubbers to prevent even small quantities of these liquids from passing through natural gas compressors. Natural gas liquids pose minimal threat to waterbodies of any kind. In the event of a spill, the condensate is nonpersistent, that is, with its low specific gravity and high vapor pressure, it will rise to the water's surface and quickly evaporate and dissipate so that recovery will likely be unnecessary, if not totally impossible. Finally, since the parts cannot be separated from the whole, regulation of those portions of natural gas pipeline systems that cross either under or over water is tantamount to regulating the whole pipeline, something the Department of Transportation already does under the authority of the Natural Gas Pipeline Safety Act of 1968, as amended.

For purposes of this issue, it is worth noting how "oil" is defined by DOT's Research and Special Programs Administration (RSPA), which regulates both oil and natural gas pipeline safety. In its regulations implementing onshore response plans pursuant to OPA 90, RSPA includes petroleum, fuel oil, vegetable oil, animal oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include natural gas liquids. RSPA's omission of this condensate is entirely consistent with OPA 90, which does not mention natural gas in its definition of "oil" or anywhere else.

Nothing in the definition of "oil" in OPA 90 would indicate that it includes condensate. Nor is natural gas condensate specifically defined or mentioned in the Act. Therefore, in developing the regulations, MMS should state that condensate is not regulated under OPA 90.

INGAA and the natural gas pipeline industry thank MMS for the opportunity to comment on this rulemaking and look forward to working with all effected parties in the future. If you have any questions, please feel free to contact me directly at (202) 626-3235.

Sincerely,

Lisa S. Beal

Lisa S. Beal
Director, Environmental Affairs

February 25, 1994

Mr. John Mirabella
Chief, Engineering and Standards Branch
Department of the Interior
Minerals Management Service
Mail Stop 4700
381 Elden Street
Herndon, Virginia 22070-4817

Subject: Oil Spill Financial Responsibility for Offshore Facilities Including State Submerged Lands and Pipelines; 30 CFR Part 253; Advanced Notice of Proposed Rulemaking

---

Dear Mr. Mirabella:

In response to the above referenced advanced notice of proposed rulemaking (ANPR), which was published in the *Federal Register* (58 FR 44797) on August 25, 1993, the Interstate Natural Gas Association of America (INGAA) wishes to provide the following comments.

INGAA is a non-profit national trade association representing virtually all interstate natural gas transmission pipeline companies operating in the United States and interprovincial pipelines operating in Canada. INGAA's U.S. members operate over 200,000 miles of pipeline and related facilities and account for over 90 percent of all natural gas transported and sold in interstate commerce.

GENERAL COMMENTS

INGAA asserts that MMS has exceeded its statutory authority by including natural gas condensate under the definition of oil under OPA 90. Further, the amount of insurance or other evidence of responsibility requested, $150,000,000, and the treatment of the insurer as a guarantor rather than an indemnitor is of major concern. INGAA's specific comments and concerns are provided below. The comments are organized based on the specific questions which MMS posed in the ANPR.

1. **The MMS solicits information on the types and locations of facilities that may be subject to the offshore financial responsibility requirements of OPA 90. The OPA 90 defines an offshore facility of any kind located in, on, or under any of the navigable of the U.S., and any facility of any kind which is subject to the jurisdiction of the U.S. and is located in, on, or under any other waters, other than a vessel or a public vessel. In addition, OPA 90 defines a facility as any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes. Comments are invited on whether or not, and if not why not, this definition includes: Pipelines crossing over bodies of water on bridges, piers, breakwaters, berms or similar structures; Fuel storage tanks, piping, and hoses installed in, on (i.e., in contact with or supported above), or under navigable waters, including those facilities in private marinas; Pipelines in, on, or under inland navigable waters, but not crossing the inland inland navigable waters; Pipelines that cross in, on, or under both land masses and inland navigable waters; Pipelines that cross under inland navigable waters in tunnels or are surrounded by other impermeable barriers; Pipelines that cross the waters of the U.S. and the waters of another country; Drill strings, flow lines, or production casing extending under navigable waters but originating from land-based drilling and production facilities; and Other structures to which the applicability of OPA 90 may be unclear.**

DEFINITION OF OIL

Four major oil spills, including the *Exxon Valdez*, took place in U.S. waters in 1989. Congress soon determined that legislation was needed to "internalize" the costs of oil spills "within the oil industry and its transportation sector."[1] The following year, Congress passed OPA 90.

Among other things, OPA 90 establishes financial responsibility requirements for: (1) vessels that carry oil as a cargo or fuel; (2) deepwater ports beyond the territorial sea[2] that are licensed for the transportation of oil; and (3) other offshore facilities

---

1 S. Rep. No. 94, 101st Cong., 1st Sess. 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723.

2 The territorial sea ends three miles offshore.

used in oil exploration, storage, handling, transportation, and similar activities. In all these cases, it is the "responsible party" who must demonstrate financial responsibility.

For vessels, the responsible party's maximum liability is set on a sliding scale depending on the amount of oil that can be transported, and the financial responsibility requirements are set according to that sliding scale.[3] The responsible party for a deepwater port is potentially liable for $350 million in oil spill damages, and must also demonstrate $350 million in financial responsibility.[4] Accordingly, the amount of required financial responsibility for vessels and deepwater ports is commensurate with the responsible party's maximum liability under OPA 90. In contrast, the financial responsibility level for each offshore facility is $150 million, regardless of the statutory maximum liability, and regardless of the facility's operational or environmental risk.[5]

MMS has taken the position that, if natural gas pipelines are "offshore facilities" within the meaning of OPA 90, they are subject to this $150 million requirement unless they "handle or produce only dry natural gas."[6] Although MMS does not explain its rationale in detail, apparently MMS is arguing that natural gas liquids (i.e., " highly volatile, light end petroleum fractions"[7]), normally referred to as natural gas condensate, fall within the Act's definition of "oil."

INGAA believes that MMS has exceeded its statutory authority by including natural gas condensate under the definition of oil. In OPA 90, "oil" is defined as

> "Oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under...the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act.[8] "

---

3 33 U.S.C.A. § 2704(a)(1) and (2), 2716(a) (West Supp. 1993).

4 §§2704(a)(4), 2716(c)(2).

5 §2716(c)(1).

6 *Oil Spill Financial Responsibility for Offshore Facilities Including State Submerged Lands and Pipelines*, 58 Fed. Reg. 44,797, at 44,799 (Aug. 25, 1993).

7 *Id.*

Natural gas condensate does not fit this definition. Condensate is a light hydrocarbon liquid obtained by condensation of hydrocarbon vapors. It consists of varying proportions of butane, propane, pentane and heavier fractions, with little or no ethane or methane. Condensate is found in the gaseous phase in the subsurface reservoir but will separate out in liquid form at the pressures and temperatures at which production separators normally operate. As a practical matter, natural gas pipelines do not carry a great deal of condensate, for to do so would inhibit their ability to carry natural gas. Compressor stations typically have slug catchers or scrubbers to prevent even small quantities of these liquids from passing through natural gas compressors. Natural gas liquids pose minimal threat to waterbodies of any kind. In the event of a spill, the condensate is nonpersistent, that is, with its low specific gravity and high vapor pressure, it will rise to the water's surface and quickly evaporate and dissipate so that recovery will likely be unnecessary, if not totally impossible. Finally, since the parts cannot be separated from the whole, regulation of those portions of natural gas pipeline systems that cross either under or over water is tantamount to regulating the whole pipeline, something the Department of Transportation already does under the authority of the Natural Gas Pipeline Safety Act of 1968, as amended.[9]

For purposes of this issue, it is worth noting how "oil" is defined by DOT's Research and Special Programs Administration (RSPA), which regulates both oil and natural gas pipeline safety. In its regulations implementing onshore response plans pursuant to OPA 90, RSPA includes petroleum, fuel oil, vegetable oil, animal oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include natural gas liquids.[10] RSPA's omission of this condensate is entirely consistent with OPA 90, which does not mention natural gas in its definition of "oil" or anywhere else.

Nothing in the definition of "oil" in OPA 90 would indicate that it includes condensate. Nor is natural gas condensate specifically defined or mentioned in the Act. Therefore, in developing the regulations, MMS should state that condensate is not regulated under OPA 90.

OFFSHORE FACILITIES

In this ANPR, the MMS has correctly observed that "...these new [OPA] authorities and responsibilities apply to offshore facilities that MMS currently regulates for oil and gas operations on the OCS [Outer Continental Shelf]" (58 FR 44797). However, the

---

8 OPA 90 §1001(23).

9 49 App. U.S.C. 1672, *et seq.*

10 *49 C.F.R. §194.5 (1993) see 58 Fed. Reg. 254 (Jan. 5, 1993).*

MMS also stated that its "preliminary interpretation of the OPA 90 requirements" indicates that the financial responsibility provisions under OPA §1016(c) apply additionally to "offshore facilities" "on the OCS and other U.S. navigable waters." In support of that interpretation, the MMS offered a legal rationale for inferring a Congressional desire to fundamentally alter the historically and currently understood meaning of "offshore facility:"

> Through its definition of the terms "navigable waters of the United States," and "offshore facility" in Section 1001(22), OPA 90 extends its provisions concerning offshore facilities to facilities in, on, or under navigable waters of the U.S. and any facilities subject to the jurisdiction of the U.S. in, on, or under other waters. Thus, for example, a company operating a petroleum pipeline that crosses the Ohio River below Pittsburgh, Pennsylvania would be subject to the $150 million financial responsibility provisions of this rule, as would the operator of an oil well in the Great Lakes.[11]

Based on this overly broad interpretation, the MMS has solicited "information on the types and locations of facilities that may be subject to the offshore financial responsibility requirements of OPA 90," including "pipelines."

Even if natural gas condensate fell within the Act's definition of "oil," the act does not require a showing of financial responsibility for onshore natural gas pipelines which cross inland navigable waters, regardless of their location or the quantity of condensate such lines may carry. For one thing, "onshore facilities" are expressly excluded from the Act's financial responsibility section. Many types of facilities identified by MMS as potentially included under the definition of "offshore facility"—pipelines, storage tanks, private marinas, etc.—are instead held by responsible parties for "onshore facilities" as that term is used in Section 1004(a)(4) and are distinct from, and therefore are not held by, responsible parties for "offshore facilities" under Section 1004(a)(3). This reading is confirmed by OPA's legislative history, particularly the House Conference Report which, in discussing OPA's definitions, expressly clarified:

> To the extent that docks, piping, wharves, piers, and other similar appurtenances that rest on submerged land and that are directly or indirectly connected to a land-based terminal are deemed to be part of an onshore facility under the FWPCA, they are likewise deemed to be part of an onshore facility under the Conference substitute.[12]

---

11 *58 Fed. Reg. 44, 798 (Aug. 25, 1993).*

12 *H. Conf. Rep. No. 653, 101st Cong., 2d Sess., 102 (1990).*

Thus, these "onshore facilities," including pipelines, which incidentally traverse navigable waters or wetlands would not be considered "offshore facilities" and, therefore, would not be addressed by the financial responsibility requirements of Section 1016(c). In response to the MMS' preliminary interpretation of OPA §1016(c), 33 U.S.C. §2716(c), INGAA believes that MMS' position represents a totally incorrect reading of the OPA, a reading which Congress never intended and which the legislative history of OPA does not support. INGAA urges the MMS to reconsider its erroneously expansive view of the extent of OPA §1016(c)'s geographic reach and confine the application of its financial responsibility requirements to those "offshore facilities" which are, in fact, engaged in the exploration and production of oil on the Outer Continental Shelf (OCS)

2. **Section 1016(e) of OPA 90, and 33 CFR part 135 enumerate the following potential ways of demonstrating financial responsibility: Insurance; Guaranty; Indemnity; Surety Bond; Letters of Credit; Qualification as self-insurer; or Any combination of the above methods. What additional methods of evidence of the $150 million level of financial responsibility exist to enable responsible parties and guarantors to meet the requirement? Do all of these methods provide equal assurance that all claims will be paid in a timely manner?**

The amount of insurance or other evidence of responsibility requested, $150,000,000, is of major concern to INGAA. The amount is more than some members carry on their whole corporation and bears no relationship to public health risks or potential environmental damage that might result from an accident concerning a natural gas pipeline or other facility. INGAA believes that the cost of obtaining the kind and amount of insurance would be disproportionate to the benefits that the Service can show from regulating natural gas facilities. In addition, the amount would cause serious financial burdens for producers, pipelines and distribution companies.

The annual costs of such a showing would be immense, and it is by no means certain that such an amount of insurance, covering pollution caused by sudden and accidental events, could be obtained at any price. A letter of credit or bond in that magnitude could cost between $300,000 and $600,000 per year. Self insurance would lead to major impacts on the financial health of the organization and severe disruption of a company's normal credit channels, not to mention the impact on its shareholders. Very likely, the Securities and Exchange Commission would require disclosure of this impact on SEC Form 10K. In short, it is an absolutely inappropriate amount of money for many natural gas transmission companies to guarantee.

Additionally, the ANPR language that would treat the insurer as a guarantor rather than an indemnitor is unacceptable. At least one member has been informed by its primary broker that insurance would not be offered at any price based on this premise. This would force companies to seek significantly more expensive alternatives such as surety bonds or letters of credit, which also may or may not be available. Since OPA 90 allows for various methods of evidence for demonstrating financial responsibility, INGAA strongly recommends that MMS implement regulations that provide a full menu of options for demonstrating financial responsibility including treatment of the insurer as an indemnitor rather than the guarantor, and self insurance.

A self-insurance option should be a simple assets to liabilities test, similar to the requirements of the Coast Guard and DOT in 33 CFR §135.215. For facilities under common ownership, MMS should allow for single financial assurance mechanisms. Financial assurance mechanisms should include existing contractual commitments for spill response costs. In order to maximize the availability of options and ensure the development of effective regulations, INGAA recommends that a Government-Industry task force be assembled to develop these requirements.

3. **Section 1019 of OPA 90 states, "A State may enforce, on the navigable waters of the State, the requirements for evidence of financial responsibility under Section 1016." The MMS is seeking comments on: existing State programs that can be demonstrated to be equivalent to OPA 90; other State programs that address oil spill financial responsibility; how States expect to administer evidence of financial responsibility programs consistent with OPA 90; what relationships can exist between MMS and States that do and States that do not have their own evidence of financial responsibility programs; how MMS can verify that a State program satisfies the requirements of OPA 90; what contact and coordination mechanisms MMS can establish with States; and to what extent MMS may be allowed to defer offshore facility financial responsibility under OPA 90 to a State program.**

Many of the specific questions posed by MMS in this section must necessarily be answered by the States themselves. However, INGAA has observed that most of the programs enacted by the states recognize the fact that all facilities are not identical, either in size, location or capacity to prevent or contain oil spills, and the level of financial responsibility which a facility must demonstrate is set accordingly. Additionally, among the states that require demonstration of financial responsibility,

most clearly apply only to facilities in offshore locations, i.e. open bays, territorial seas, etc., and those located on waterfronts or tidally influenced coastal waters.

INGAA agrees that a single evidence of financial responsibility for offshore facilities is appropriate and has no objection to a state enforcing that provision for state waters. However, this enforcement authority should not be perceived or interpreted by either the states or MMS as presenting a separate violation for state waters and federal waters under OPA. OPA Section 1016(c) clearly states that where a person is responsible for more than one offshore facility, only one evidence of financial responsibility sufficient to satisfy the facility having the greatest maximum liability is required. If, for some reason, that evidence is flawed or insufficient, OPA Section 1016(c) has been violated, but unless there is a provision in state law requiring the same level, *only* OPA has been violated. If a state proceeds with an enforcement action, this should preclude any similar enforcement action on the part of MMS for the same violation.

4. **The oil and gas industry has expressed concerns regarding the availability of insurance for those responsible parties that cannot self-insure. Insurers attribute their problem to claimant direct action, duplicative liability under State law, and determination of covered damages. The MMS is seeking comments regarding: whether and how direct action, language limiting liability, uncertain scope of damage provisions, and lack of preemption provisions in OPA 90 affect the availability of insurance; and what regulatory approaches are available under OPA 90 that may improve the availability of an insurance market.**

To effectively manage a solvent insurance/indemnity instrument, a provider must have some means of probablistically assessing the size and frequency of qualifying pollution incidents. Sixty years of experience on the OCS provides a means of partially assessing these factors. Under OPA, however, as this question apparently recognizes, the climate differs in a number of material ways from that of the previous 60 years. OPA more than quadruples liability limits. It significantly expands the grounds for claims to include, for instance, subsistence use, public service costs, and unlimited lost public revenues. In addition, the scope of natural resource damages remains uncertain in the absence of final regulations from NOAA; however, the prospect of liability for "nonuse values", measured by the contingent valuation method (CVM), could back up even the largest companies operating OCS leases. Further, OPA provides no liability limit on clean-up costs for offshore facilities.

While these problems significantly increase the uncertainty in underwriting risks on the OCS, the potential application of direct action requirements to insurers causes fundamental problems, particularly given concerns that some U.S. courts could pierce "guarantor" liability limits, for example, under "bad faith" claims. Not only does it pose the possibility of increased liability for damages, but it has raised the specter that an OPA insurer might be construed to be a guarantor under a state scheme. It is INGAA's understanding that the language in OPA addressing guarantor liability limitation, which supersedes language in the OCS Operations Indemnification Clarification Act, is not adequate to convince guarantors that their liability is explicitly limited.

The insurance industry has indicated they *will not* under any circumstances as OPA 90 is currently written, furnish certification of financial responsibility to any governmental agency. It is very apparent from industry discussions with worldwide energy and liability underwriters that the insurance markets *will not* agree to be Guarantors under OPA 90 and *will not* accept direct action. The reasons for this refusal are varied but unyielding—the belief (rightly or wrongly) that OPA 90's limitation of a Guarantor's liability will not survive a U.S. court challenge, the realization that legal and other defense expenses as a Guarantor would be in addition to the $150 Million limitation under OPA 90, the potential for an unlimited number of claimants who could mount a direct attack on the certifying insurers (thus, in the eyes of the insurers, threatening their very existence), and finally the lack of preemption of State law and consequential risk of "double jeopardy."

Since most responsible parties will not be able to satisfy the requirements for self-insurance on their own, the aforementioned stance of the insurance community is particularly significant. However, in examining the law, we believe, notwithstanding this absolute refusal of the insurance community to take on the role of the Guarantor, that regulations can be promulgated whereby the existence of pollution liability insurance can satisfy OPA 90 financial responsibility requirements. The regulations should accept policies containing coverage within the normal terms and scope of coverage provided. For example, liability policies providing sudden and accidental or appropriate named peril seepage and pollution coverage for bodily injury and property damage should be accepted as evidence of financial responsibility without forcing the underwriters to comply with the unfamiliar and, in their opinion, unproven verbiage in the Act. In fact, we believe OPA 90's emphasis on the Guarantor's liability is a separate issue. Section 1016e clearly gives the MMS the authority "as appropriate..." to "specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing evidence of financial responsibility to effectuate the purposes of this Act." We believe this verbiage empowers the MMS to clarify the insurer's role as that of an Indemnitor whose insurance policies, either

alone or in conjunction with a responsible party's other assets, would provide evidence of the responsible party's ability to meet the financial requirements of OPA 90.

We strongly recommend, therefore, that the regulations be written to allow for the consideration of insurance policies which provide elements of seepage and pollution (such as operator's extra expense policies, third party liability policies, stand-alone seepage and pollution policies, etc.) as a means to satisfy the financial tests required under OPA 90. This proof of applicable insurance in the amount of $150 million will, on its own, provide evidence of the responsible party's financial responsibility while still leaving the role of "Guarantor" with the responsible party holding the applicable insurance policies. We believe the existence of current insurance policies to respond in the event of a loss is comparable in worth to the liquid financial assets which would be available to a responsible party in the same loss scenario. Most responsible parties already carry insurance policies which cumulatively provide limits equal to or in excess of the $150 million financial responsibility requirements. Recognition of this coverage by the MMS would satisfy the intent of the law without imposing unrealistic conditions (1) which could not be met by most responsible parties on their own or (2) underwriters who are unwilling to comply *at any price*.

The MMS and the oil and gas industry together should develop a checklist of coverages and policies which, if maintained by a responsible party, would be accepted as evidence of financial responsibility. We recommend that regulations permit an opinion letter stating such party maintains the required insurance to serve as the form of evidence.

We also recommend that insurance policies (although not to be construed as assets) be considered in conjunction with established corporate assets in the determination of financial responsibility for a self-insured responsible party.

If the prospects for the availability of an insurance market are to be improved, then MMS must recognize that the financial rigidity of the current market place is not subject to change by the will of the parties involved. All regulatory flexibility allowed by OPA should be utilized if markets are to be available, including: explicit limitation of guarantor liability in the COFR agreement; acceptance of "insurance as an asset" in self-insurance tests; development of additional policy defenses beyond those explicitly identified in OPA; and, including the effective elimination of direct action requirements by interpreting the term "guarantor" in a manner which both facilitates the availability of insurance, and meets the legislative intent of OPA.

5. **Section 1016(e) of OPA 90 authorized MMS, as the agent of the President, to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing evidence of financial responsibility. The MMS is seeking comments regarding: what defenses should be available to a Guarantor to ensure the availability of affordable bonds, insurance, or other forms of guarantees; on what terms and conditions, if any, should bank letters of credit be acceptable as evidence of financial responsibility; on what terms and conditions, if any, should third party guaranties be acceptable as evidence of financial responsibility; on what terms and conditions should a lessee/operator be allowed to self-insure for financial responsibility obligations under OPA 90.**

Clearly, the principle objection to OPA by surety companies, banks, insurers, indemnitors and guarantors alike is the potential application to them of the requirement of direct action. The MMS has the ability to limit or effectively render immaterial direct action against all persons, except the responsible party, and can do this while still protection potential claimants against damages, while still protecting the Fund, and without altering the incentive structure of the responsible party and potential claimants, as is arguably possible under direct action.

INGAA supports a regulatory regime permitting responsible parties the option of demonstrating financial responsibility with all legitimate methods available.

- A lessee/operator should be allowed to self-insure if that entity has adequate short term liquidity from all its sources of available credit for those costs and claims that may arise in the immediate time frame after a spill incident, or if it has sufficient longer term capital resources to discharge its liabilities as established under Section 1004 of OPA. Liquidity measures should include committed bank lines of credit.

  The current requirements for qualification as self-insurer for offshore facilities (33 CFR 135.213) are, for the most part, sufficient to protect the public good while still allowing industry the flexibility needed in order to comply. The use of evidence of insurance coverage as another basis for self-insurance or as a stand-alone means of "other evidence" of financial responsibility is strongly encouraged. Specifically, the MMS should evaluate a wide range of a corporation's assets which would be available to assure its financial ability to satisfy oil spill liabilities. It is significant that an insured party, pursuant to the terms of its policy, obtains an asset, a contractual entitlement to money,

which materializes coincident with its incurrence of liabilities for an oil spill. In fact, such an asset of a corporation, unlike others, is not susceptible to manipulation or obfuscation by its owner, i.e., its existence is inextricably tied to satisfying the corporation's oil spill liabilities. In that sense, it merits greater recognition as an asset of a self-insurer than other assets which have traditionally been so recognized. Crucially, INGAA would remind the MMS that there is absolutely no statutory impediment to the recognition of insurance coverage as an asset of a self-insurer under OPA. Additionally, the financial health of the self-insurer could be ascertained by conventional commercial means (bond rating, etc.).

- It will be very important for the working of insurance markets that MMS not hold insurers who collectively might provide a guaranty jointly and severally liable. Joint and several liability destroys the concept of "layered" coverage, effectively holding the provider of the top layer accountable for all layers.

- To facilitate the availability of the methods allowed, MMS should specify as "necessary" all policy defenses that prove to be essential for the various methods of evidencing financial responsibility, while still providing the desired level of security.

- Letters of credit should contain the terms most favorable to a claimant under OPA while not being so prohibitive as to curtain their broad availability. Bank letters of credit should be acceptable under all circumstances if the banks are financially secure and the letter is structured as a documentary credit (paid under certain conditions precedent). Also, since the full face value of the letter of credit will be paid at once, it may be more equitable for the amounts paid under the letter of credit to be deposited into a trust facility that is dedicated to Section 1002 claims. If the full amount is not eventually required, remaining funds can be returned to the responsible party.

- Third party guaranties should mirror the self-insurance requirements as promulgated, but should not contain any aggregate limitation as proposed for vessels; none is required by the Act and, given the rarity of OCS spills, none is warranted.

6. **Self-insurance, as well as insurance, re-insurance, and other indemnity mechanisms have been identified as methods to achieve the $150 million oil spill financial responsibility requirement of OPS 90. The MMS is seeking comments regarding: what organizational structures**

could be used for other indemnity mechanisms; what limitations are appropriate for these indemnity mechanisms to ensure that adequate financial responsibility coverage exists for all participating responsible parties; to what extent can a single indemnity mechanism be acceptable as evidence for a number of responsible parties or their offshore facilities; should the utilizations of a single indemnity mechanism be limited by a maximum number of offshore facilities or a maximum volume of oil handled by the offshore facilities, if not, why not; and what financial tests or criteria should be used to judge application for self-insurance.

This question is partially addressed in the response to question #5, particularly those parts relating to self-insurance. Section 1016(c) requires that "each responsible party with respect to an offshore facility shall establish and maintain financial responsibility...." However, this is not to say that a single indemnity instrument may not be acceptable as evidence for a number of responsible parties or their offshore facilities.

As for a limit on the number of facilities evidenced on a single indemnity, it should be noted that the focus of OPS is on the greatest single exposure. Given the industry's strong environmental performance on the OCS over the past decades, the likelihood of simultaneous worst-case incidents is a near impossibility. MMS needs only to look to the minimal effects of Hurricane Andrew in 1992 to validate the industry's environmental performance.

7. **For the purposes of administering Section 1016 of OPA 90, the MMS interpretation of the definition for "oil" in Section 1001(23) of OPA 90, excludes facilities that handle or produce only dry natural gas. The MMS recognizes that some quantity of natural gas liquids may be produced with the gas. Facilities handling at any one time 1,000 barrels or less of these highly volatile, light end petroleum fractions were exempted from the USCG financial responsibility regulations (33 CFR Part 135) because these liquids posed significantly less environmental risk than crude or refined oil. The MMS is seeking comments and the basis for those comments regarding:**

   (a) **Should offshore facilities that store or process only dry natural gas be exempt from the financial responsibility requirements of OPA 90?**

Offshore facilities that store or process only dry natural gas should be exempt from the financial requirements of OPA. The statute applies to "a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable water or adjoining shorelines or the exclusive economic zone" [Section 1002(a)]. In addition, Section 1001 does not include a definition for either "gas" or "natural gas," nor are these terms mentioned in the definition of "oil," further demonstrating that it was not the intent of Congress to include such substances under the provisions of the Act or subsequent regulations (see the comments in question 1 above).

Overall, such facilities should be exempt from regulations since dry natural gas does not contain oil or any liquid hydrocarbons and, therefore, does not pose the threat of a discharge of oil into or upon the navigable waters or adjoining shorelines, which is the focus of the OPA and consistent with the regulatory action of other relevant federal agencies involved in OPA response plan implementation (e.g., EPA, RSPA, USCG).

(b) Should offshore facilities that store or process a de minimis quantity of natural gas condensate be exempt from the financial responsibility requirements of OPA 90?

Offshore facilities that store or process natural gas condensate in any amount should be exempt from the financial responsibility requirements of this statute. This condensate is a light hydrocarbon liquid obtained by condensation of hydrocarbon vapors. It consists of varying proportions of butane, propane, and pentane, and heavier fractions, with little or no ethane or methane. Condensate is found in the gaseous phase in the subsurface reservoir and will separate out in liquid form at standard pressure and temperature. Natural gas condensate is a nonpersistent hydrocarbon liquid which, with its low specific gravity and high vapor pressure, will rise to the water's surface and quickly evaporate and dissipate so that recovery of a spill will likely be unnecessary or impossible. Because it evaporates and dissipates very rapidly, natural gas condensate poses a negligible environmental risk.

Additionally, offshore exploration and production facilities incorporate design features such as blowout preventers, sub-sea safety valves, redundant safety devices and automatic "fail-safe" shut-in systems to virtually eliminate even the potential for an E&P spill to assume catastrophic proportions. Proper function and operation of this equipment is assured by MMS inspection and mandatory maintenance programs, operator training and certification. If despite these proven safety systems, a spill occurs, response preparedness is achieved through comprehensive contingency planning, training, and exercises including an operator's certification that sufficient

personnel and equipment are available to respond to a "worst-case" discharge. The adequacy of MMS requirements for designing and operating offshore oil and gas facilities was emphatically demonstrated in 1992 when Hurricane Andrew slashed through the heart of the Gulf of Mexico's OCS oil and gas producing region. Although the storms path overlaid more than 700 structures, only 22, mostly older facilities, were felled. Several condensate-carrying natural gas pipelines ruptured as a result of platform failures, but by MMS's own records, these pipeline ruptures did not produce any major spills that required clean-up.

As stated in the ANPR, facilities handling at any one time 1,000 barrels or less of these highly volatile, light end petroleum fractions were exempted from the USCG financial responsibility regulations (33 CFR Part 135). The USCG exemption was based on the properties and characteristics of these light end fractions. If MMS chooses to adopt a de minimis quantity exemption, the Service must re-evaluate the basis for the 1000 bbl exemption in the USCG rules to reflect the operating conditions of natural gas pipelines. The USCG exemption was based on the volumetric storage capacity on the offshore facilities. However, in a natural gas pipeline, the volume physically occupied by the condensate is obviously considerably less than the total volume of the pipeline.

(c) What are appropriate de minimis quantities?

If MMS persists in regulating condensate under this rule and opts to impose a 1,000 barrel de minimis quantity requirement, the restriction should be applied as follows:

> A facility which stores or handles 1,000 barrels or less, or a facility which processes more than 1,000 barrels per day but has a storage capacity of 1,000 barrels or less of condensate should be exempted from the requirements of financial responsibility. The difference between the amount for storage and processing is simple. A facility which produces as an example 1,500 barrels per day will most likely ship the condensate by pipeline several times during the day. This means that at any one time less than 1,000 barrels will be stored on the platform.

Natural gas pipelines which transport condensate should be exempt from this rule, since condensate that is transported with natural gas moves rapidly and continuously through the pipeline, never accumulating 1,000 barrels at any one location at any one time.

Another factor which should be considered by MMS is that many operators have a variety of facilities which they own and/or operate. Section 1016(c)(1) states "in a case in which a person is the responsible party for more than one facility subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the facility having the greatest maximum liability." Therefore, operators which multiple facilities will likely have to meet the requirements for only one of their facilities.

This de minimis exemption can only be utilized by operators which only have gas-type facilities. In addition, it was the intent of Congress that operators of multiple facilities be required to establish responsibility for the "worst case discharge" facility. Thus, no operator should be burdened with carrying more than one certificate of financial responsibility for all their facilities.

8. **The oil and gas industry has claimed that the requirement for $150 million in financial responsibility may result in premature abandonment of wells and preclude their transfer to smaller companies. The MMS is seeking comments regarding: what information is available to substantiate this claim; and how regulations can be structured to avoid premature abandonment of producing wells.**

In some areas of the Gulf of Mexico, there is no infrastructure of crude oil pipelines to support transportation of both oil and condensate. Condensate that is produced with natural gas is therefore injected into the gas pipeline for transportation to a separation facility onshore. If condensate is not excluded from the OPA 90 requirements, some natural gas pipeline companies have indicated that they would prohibit producing companies from injecting condensate into their gas pipelines. Should this happen, producing companies would be faced with three alternatives: (1) installing condensate pipelines parallel to existing gas pipelines; (2) building offshore barge loading facilities and storage tanks required to barge the condensate to shore; or (3) shutting in the gas and condensate wells if the added expense does not allow for continued economic operation of those wells. The alternatives to the current method of handling condensate would be very costly (an estimated $750 million to $1 billion expense) and would result in increased probability of accidental release from the storage, transfer and barging of condensate from offshore locations.

CONCLUSION

In conclusion, INGAA recommends that MMS specifically exclude natural gas condensate from the definition of oil under OPA 90. If instead MMS opts to provide a de

minimis quantity exemption for condensate, the exemption should be based on the volume of liquids that are actually contained in a pipeline at a given location, rather than on the volumetric capacity of the line. MMS must recognize the fact that all facilities are not identical, either in size, location, or capacity to prevent or contain oil spills, and set the level of financial responsibility which a facility must demonstrate accordingly. If this is not possible under the current statutory language, a technical amendment to the statute should be sought. Finally, MMS should set the amount of insurance or other evidence of responsibility based on the the treatment of the insurer as a guarantor rather than an indemnitor. Without major modification, this ANPR could have a devastating impact on gas supply replacement drilling and development on the OCS. This would be a severe blow to the health of the natural gas industry and is not compatible with this Administration's goal of increased natural gas use as this nation's environmentally preferred energy source.

Sincerely,

Theodore L. Kinne
Vice President
Environment, Safety & Operations